

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RUSSELL VANBROCKLEN,

Plaintiff,

v.

DECISION AND ORDER
09-CV-897

DR. DHAM GUPTA,

Defendant.

The instant case involving federal constitutional claims pursuant to 42 U.S.C. §1983 ("Section 1983") and state law claims for intentional and negligent infliction of emotional distress, negligence, battery, violations of New York State Mental Hygiene Law, infliction of extreme emotional pain and failure to supervise, was referred to Magistrate Judge Jeremiah J. McCarthy pursuant to 28 U.S.C. §636(b)(1). On February 29, 2012, defendant Dr. Dham Gupta ("defendant") filed a motion for summary judgment seeking dismissal of plaintiff Russell Vanbrocklen's ("plaintiff") federal and state claims, on their merits, pursuant to Federal Rule of Civil Procedure 56. (Dkt. No. 163) On July 5, 2012, plaintiff, proceeding *pro se*, filed a motion to withdraw certain claims asserted against defendant. (Dk. No. 171)

On September 20, 2012, Magistrate Judge McCarthy issued a Report and Recommendation recommending the following: (1) that this Court dismiss

plaintiff's Section 1983 claims in their entirety because plaintiff cannot demonstrate, as a matter of law, that defendant is a state actor; and (2) that this Court decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims. (Dkt. No. 172) Magistrate Judge McCarthy recommended that defendant's motion for summary judgment be granted in part and denied in part, by dismissing plaintiff's federal claims on their merits and dismissing plaintiff's state law claims without prejudice to their reassertion in state court. *Id.*

Magistrate Judge McCarthy also recommended denial of plaintiff's motion to withdraw claims, without prejudice to its reassertion in state court. *Id.*

Plaintiff filed objections to the Report and Recommendation on October 10, 2012. (Dkt. No. 174) Defendant filed a response on October 24, 2012. (Dkt. No. 176) Plaintiff was given until November 5, 2012 to file a reply. However, he failed to do so. On January 25, 2013, this Court issued an order instructing plaintiff to file a reply, or notice of no reply, by February 4, 2013. Plaintiff again failed to comply with the Court's instructions, and the Court deemed the matter submitted.

Pursuant to 28 U.S.C. §636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review, and after reviewing the submissions from the parties, the Court hereby adopts Magistrate Judge McCarthy's recommendation granting in part and denying in part defendant's motion for summary judgment and denying plaintiff's motion to withdraw claims.

Accordingly, for the reasons set forth in Magistrate Judge McCarthy's Report and Recommendation, plaintiff's federal law claims are dismissed on their merits and with prejudice. Plaintiff's state law claims are dismissed without prejudice to their reassertion in state court. Plaintiff's motion to withdraw claims is denied also without prejudice to its reassertion in state court.

The Clerk of the Court is directed to close the case.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: March 22, 2013